IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 317/10
5295003

	BETWEEN	ARVIND KUMAR Applicant
	AND	WAIKATO STEEL FABRICATORS LIMITED Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Megan Zetko for Applicant Senga Allen for Respondent
Submissions received:	10 May, 16 June 2010 from Applicant 31 May 2010 from Respondent
Determination:	8 July 2010

DETERMINATION OF THE AUTHORITY ON PRELIMINARY ISSUE

Employment Relationship Problem

[1] Mr Kumar was dismissed from his employment on 6 May 2009. On 9 February he lodged in the Authority a personal grievance alleging that the dismissal was unjustified. That application acknowledged that the grievance was raised outside the statutory time frame of 90 days (by letter dated 11 December 2009.) Because Waikato Steel Fabricators did not consent to the raising of the grievance in that way, the applicant sought leave to raise the matter out of time pursuant to s. 114 and s. 115 of the Employment Relations Act 2000. At the request of the parties I now proceed to determine as a preliminary matter and on papers the question whether leave should be granted.

Issues

[2] Section 114 provides:

"(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

(4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority-

(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and

(b) considers it just to do so."

[3] Mr Kumar relies on the following grounds:

"although Mr Kumar has an adequate understanding of written and spoken English he had no knowledge of New Zealand's employment relations law. Even the most basic employment rights which fall within the general knowledge of most members of the public are denied to him. The employer was fully on notice that Mr Kumar had recently arrived from Fiji and therefore was unlikely to understand all of the matters set down in the employment agreement. We accept the claim from the employer that the employment agreement properly sets out the employee's rights but claim that Mr Kumar's non-existent knowledge of employment relations law would have left him none the wiser of his rights even after reading the contractual terms and that the employer knew or ought to have known that this was the case."

[4] Waikato Steel Fabricators does not consider that there are exceptional and genuine reasons to support a grant of leave to raise the grievance out of time. It notes that Mr Kumar received a "*plain and simple*" description of the personal grievance and disputes procedures available to him (including the provision of an 0800 number for the Department of Labour) and asserts that Mr Kumar had the capacity to understand the information in his employment agreement because he "*would have met the stringent English language entry criteria when immigrating to New Zealand."*

[5] The issues for determination are therefore:

i. whether the fact that Mr Kumar was a recent arrival in New Zealand amounts to exceptional circumstances in terms of sections 114 and 115;

ii. if so whether these circumstances occasioned the delay, and

iii. if so, whether it is just to grant leave

(i) Were there exceptional circumstances?

[6] Although he was provided with a copy of his employment agreement when he started work, Mr Kumar says that at the time of his dismissal he was unaware of his right to pursue a personal grievance. He asserts that he was very upset about losing his job and moved from Hamilton to Dunedin in order to look for work and to have the support of family members there. He acknowledges that he spoke to his cousin about the dismissal soon after it occurred but says it was not until months later that his cousin told him he could challenge it. When he heard that he approached a local Law Centre for help.

[7] It is acknowledged in the applicant's submissions that there was attached to the employment agreement a flow chart entitled "*information about resolving an employee's employment relationship problem*" however it is argued for the applicant that in the case of an new arrival to the country such as Mr Kumar, the employer bears:

"an additional burden: to test the base knowledge and, if it is not there, then give sufficient information for the employer to know that the employee understands their rights…

the employer has admittedly done a good job of documenting the processes and rights of an employee within their employment contract, but they rely on a basic level of knowledge that Mr Kumar did not have…"

[8] It is also argued for Mr Kumar that his ability to read, write and speak English is irrelevant and that the six month delay in raising the grievance is not such as to prejudice the respondent.

[9] The respondent submitted that the Employment Relations Authority and the Employment Tribunal[1] have repeatedly rejected the submission that an inadequate understanding of employment rights may amount to exceptional circumstances. It is correct in this submission.

[10] The applicant sought to rely on *Sharma & Pegasus Station Limited (25/2/03, K Anderson (Member) AA 46/03)* however that case must be distinguished from the present case. Unlike Mr Kumar's agreement, Mr Sharma's agreement did not contain the requisite explanation concerning the resolution of employment relationship problems. That lack in itself constituted exceptional circumstances as set out in section 115 (c) of the Employment Relations Act. The fact that Mr Sharma was a recent immigrant with very limited knowledge of employment law was considered only in relation to the third limb of the test (whether the Authority should exercise its discretion to grant leave.) *Sharma* is not therefore authority for the proposition that being a recent immigrant with limited knowledge of New Zealand employment law amounts to exceptional circumstances.

[11] I have not been satisfied that there is good reason for me to depart from the approach taken in the previous cases to which I was referred. I cannot conclude that the circumstances relied on in this case were in fact exceptional.

[12] The conclusion reached in relation to the first issue effectively disposes of the matter. I decline leave to raise the grievance out of time.

Yvonne Oldfield
Member of the Employment Relations Authority

[1] See *Muggeridge v Miden Construction Co Limited [1992] 1 ERNZ 2323,* and *Thomson v Thomson [1992] 2 ERNZ 84.*